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BEFORE THE FEDERAL ELECTION COMMISSION

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In the Matter of

MUR 6252 **CELA**

A. J. OTJEN FOR CONGRESS/

COMMITTEE TO ELECT A.J. OTJEN,

AND AGNES J. OTJEN, AS TREASURER

AGNES J. OTJEN

CASE CLOSURE UNDER THE
ENFORCEMENT PRIORITY SYSTEM

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System, matters that are low-rated

are

forwarded to the Commission with a recommendation for dismissal. The Commission has determined that pursuing low-rated matters, compared to other higher-rated matters on the Enforcement docket, warrants the exercise of its prosecutorial discretion to dismiss these cases. The Office of General Counsel scored MUR 6252 as a low-rated matter.

In this matter, the complainant, Joe Bailey, states that A. J. Otjen for Congress/Committee to Elect A. J. Otjen and Agnes J. Otjen, in her official capacity as treasurer ("the Committee"), as well as candidate Agnes J. Otjen,¹ violated 2 U.S.C. §§ 441d(a)(1), 441d(c) and 441d(d) and 11 C.F.R. §§ 110.11(a)-(c) by failing to include appropriate disclaimers on two types of purported campaign communications. First, the complainant supplied photocopied samples of what he characterizes as "mass mail[ed]...fliers,"² which were allegedly distributed by the respondents in Billings, Montana and in Bozeman, Montana, on November 7, 2009. Both fliers, which invite recipients to

¹ Ms. Otjen is currently a candidate for Montana's at-large congressional seat.

² "Mass mailings" are defined to be mailings of "more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period." 11 C.F.R. § 100.27. Such mailings are considered to be "public communications" that require disclaimers, see 11 C.F.R. §§ 100.26 and 110.11(a).

1 attend a fundraiser for Ms. Otjen on November 13, 2009, request that RSVPs be directed to
2 "alicia@otjenforcongress.com, and include the Committee's website address,
3 <http://www.otjenforcongress.com/>. However, according to the complainant, because the fliers
4 failed to include disclaimers in the appropriate printed format, stating that the Committee had
5 paid for them, he claims that the respondents violated 2 U.S.C. §§ 441d(a)(1) and 441d(c) and
6 11 C.F.R. §§ 110.11(a)-(c).

7 Second, the complainant asserts that "on or about December 2, 2009, the Committee
8 began running a thirty second radio advertisement featuring Ms. Otjen as the main speaker"
9 which also omitted "the necessary disclaimers." Attached to the complaint is what
10 complainant purports to be a transcript and an audio recording of the radio spot, in which an
11 announcer states "Paid for by OtjenforCongress.com [sic]."³ However, although candidate
12 Otjen states "This is A. J. Otjen for U.S. Congress," she fails to say that she approved the
13 communication, as set forth in 2 U.S.C. § 441d(d) and 11 C.F.R. § 110.11(c). The
14 complainant concludes by requesting that the Commission investigate his allegations.

15 Ms. Otjen, who responded on behalf of the Committee as well as herself, states that
16 only 150 fliers were mailed and another 200 were handed out which, she notes, is substantially
17 under the "over 500 similar pieces of mail matter" threshold set forth in 11 C.F.R. §100.27.
18 Thus, she takes the position that the fliers did not constitute "public communications," as set
19 forth in 11 C.F.R. § 100.26 and, therefore, did not require disclaimers, *see* footnote 2. With
20 respect to the radio advertisement, Ms. Otjen concedes that she and her Committee ran six
21 radio spots that omitted the requisite statements that she had approved the messages. Ms.

³ Although the transcript provided by the complainant quotes the narrator as stating "Paid for by OtjenforCongress.com," in the audio recording, the disclaimer states "Paid for by OtjenforCongress," without the "dot com" suffix.

1 Otjen states that her omission was unintentional and that she had taken action to "correct
2 everything going forward" by adding a disclaimer to the Committee's website and to other
3 campaign materials and communications.

4 Based upon Ms. Otjen's assertions, it appears that the fliers did not meet the "over 500
5 pieces of similar mail" threshold set forth at 11 C.F.R. § 100.27. Thus, it appears that they
6 were not "public communications" that were subject to the FEC's disclaimer requirements at 2
7 U.S.C. § 441d and 11 C.F.R. § 110.11. In contrast, with respect to the campaign
8 advertisements that were broadcast on radio, appropriate disclaimers were required, including
9 statements made by the candidate approving the message, as set forth in 2 U.S.C. § 441d(d)
10 and 11 C.F.R. § 110.11(c). However, based on Ms. Otjen's response, it appears that six
11 campaign radio broadcasts may not have included such a statement. Although, given that the
12 broadcasts apparently included other identifying information, it appears that the public would
13 not have been misled as to whether Ms. Otjen had approved of the advertisements, and that
14 any violations of 2 U.S.C. § 441d(d) and 11 C.F.R. § 110.11(c) were technical in nature and
15 unintentional. Accordingly, in furtherance of the Commission's priorities and resources,
16 relative to other matters pending on the Enforcement docket, the Office of General Counsel
17 believes that the Commission should exercise its prosecutorial discretion and dismiss this
18 matter. *See Heckler v. Chaney*, 470 U.S. 821 (1985). Additionally, this Office intends on
19 reminding Agnes J. Otjen, and A. J. Otjen for Congress/Committee to Elect A. J. Otjen and
20 Agnes J. Otjen, in her official capacity as treasurer, of the requirements under 2 U.S.C. § 441d
21 and 11 C.F.R. § 110.11 concerning the use of appropriate disclaimers on radio advertisements
22 made in connection with the campaign.

RECOMMENDATIONS

The Office of General Counsel recommends that the Commission dismiss MUR 6252, close the file, and approve the appropriate letters. Additionally, this Office recommends reminding Agnes J. Otjen, and A. J. Otjen for Congress/Committee to Elect A. J. Otjen and Agnes J. Otjen, in her official capacity as treasurer, of the requirements under 2 U.S.C. § 441d and 11 C.F.R. § 110.11 concerning the use of appropriate disclaimers on radio advertisements made in connection with the campaign.

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4/14/10

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